In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, on behalf of himself and "some 20,000 longshoremen of his Union" (Pet. 3), commenced the present action in the United States District Court for the Southern District of New York under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Federal Tort Claims Act, 28 U.S.C. 1346. The complaint essentially challenged a Corps of Engineers' permit, issued in December 1966 to respondent The Port of New York Authority,[1] to deposit in a designated area (covering approximately 23.5 acres) in the Hudson River, as part of a landfill-development project, fill from excavation at the nearby World Trade Center site. Petitioner asked that the permit be declared illegal, not because its issuance had been improper under the applicable statute (33 U.S.C. 403) or regulations (33

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[1]The Port of New York Authority has since become the Port Authority of New York and New Jersey.

C.F.R. 209.110 *et seq.*), but because it would have the effect of eliminating Piers 3 to 13 on the river, thereby depriving members of the represented class of their so-called "'Constitutional right to the use and benefit of waterfront property and piers and the free use of navigable rivers'" (Pet. App. A 4). In addition, the complaint separately sought a declaration that the grant by the States of New York and New Jersey of tax exempt status to the World Trade Center illegally deprived citizens of New York City of tax revenue (Pet. App. A 5).

Respondents moved in the district court for dismissal of the suit for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The district court granted the motions (Pet. App. A 3-9) and the court of appeals affirmed (Pet. App. A 1-2).

The decision below is correct and does not warrant review by this Court.

1. Petitioner seeks to invoke the district court's jurisdiction under the Declaratory Judgment Act, 28 U.S.C. 2201. But, as that court pointed out, citing *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671, 672, that "Act by itself does not confer subject matter jurisdiction on the federal district courts" (Pet. App. A 5). Moreover, no claim has been made that the Corps of Engineers' action in 1966 exceeded its permit authority in 33 U.S.C. 403, or the regulations promulgated thereunder (32 C.F.R. Part 209.110 *et seq.*). And, in 1968, Congress specifically ratified the permit involved here, as the district court observed (Pet. App. A 7; footnotes omitted), "by declaring the filled area to be 'nonnavigable waters of the United States within the meaning of the laws of the United States' [82 Stat. 736, 33 U.S.C. 59c-1], thus removing the matter from the ambit of Title 33, U.S. Code, Section 403."

2. Petitioner's reliance on the Federal Tort Claims Act 28 U.S.C. 1346, as an alternative jurisdictional basis for this action also is unfounded. That statute confers jurisdiction only over claims against the United States for "money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *." This plainly is not such a case. The district court correctly held (Pet. App. A 6):

> [Petitioner's] claim of damage rests on the assertion that he or the longshoremen or seamen who had worked there [on Piers 3 to 13] will find no employment at that place in the future. At most, this might constitute an interference with contract rights. But even assuming such an interference, the Federal Tort Claims Act by its terms provides that it shall not apply to "any claim arising out of . . . interference with contract rights." Title 28, U.S. Code, Section 2680(h).

3. Finally, the district court properly declined to entertain petitioner's challenge to the grant by the States of New York and New Jersey of tax exempt status to the World Trade Center. As it pointed out (Pet. App. A 8, "[i]ssues of state taxation and public law are more appropriately heard in the state courts, at least in circumstances such as these." The court noted (*ibid.*), moreover, that "the New York Courts have already entertained a number of suits attacking the constitutionality of that Legislation [granting tax exempt status to the Center] and have uniformly resolved them in favor of the project."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.